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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT D. WALKER,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 18A05-0701-PC-69
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0303-PC-2

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Robert D. Walker appeals the denial of his petition for post-conviction relief (“PCR”), contending that his appellate counsel was ineffective for failing to challenge Walker’s sixty-year sentence on direct appeal in light of evidence of Walker’s “mental retardation.” *Appellant’s Br.* at 2.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 17, 1990, Walker was convicted of felony murder following a jury trial, and was sentenced to sixty years in prison. On direct appeal to the Indiana Supreme Court, appellate counsel raised two issues, but did not challenge Walker’s sentence.

The facts of the case as found by our Supreme Court on appeal were as follows:

The victim in this case, Earnest Daugherty, age eighty-two, lived alone in his trailer in Muncie, Indiana. At 11:15 a.m. on July 15, 1985, Daugherty was observed as being in good health. At approximately 1:00 p.m. that same day, his daughter, Bessie Martin, visited the trailer and found that it had been broken into. Upon entering, she heard her father moaning. She found him in the bedroom bleeding from the head. She noticed a box fan overturned in the bedroom, the telephone was dead, and a carton of Viceroy cigarettes she had purchased for her father the day before was missing from on top of the refrigerator where Daugherty always kept his cigarettes.

Police and an ambulance were summoned but Daugherty eventually died of his wounds. The pathologist concluded that Daugherty died of severe head injuries from being struck by a blunt instrument, compatible with having been struck by the fan.

The day after Daugherty’s injuries, appellant, who lived in a trailer four doors from Daugherty, told police he was sick in bed when the beating occurred. However, appellant’s live-in girlfriend repeatedly telephoned him at home on July 15 between 11:30 and noon with no answer. Later that day, appellant would not answer his girlfriend’s questions about what had happened at Daugherty’s trailer or where he had been earlier that day. Appellant was unusually quiet that night and became upset the next day when he learned his girlfriend had spoken to police.

Within a week of the incident, appellant began drinking alcohol with his friend Wayne Wells and told Wells that he was nervous. He related that recently he and Troy Miller had gone into the home of an "old man" looking for social security money. The old man was in the bedroom and did not hear them enter. Appellant admitted he beat the old man and hit him with the fan causing his own clothes to become bloody. Although the old man attempted to resist, appellant stated he was not moving when they left him. He told Wells he took a carton of cigarettes and that he and Miller took some money. However, appellant asked Wells not to reveal what he had told him.

After Wells talked to police in April of 1990, Detective Irelan and Detective Charles Hensley interviewed appellant. Appellant at first denied any participation in the murder, stating that he suspected his ex-roommate "Paul." He told the detectives that Miller admitted the murder and that he (appellant) was sick in bed at the time of the murder. After the police confronted appellant with inconsistent statements and questioned him as to why he knew of certain details of the crime which had not been published, appellant stated he wanted to be honest, began to cry, and asked if he would be jailed. Appellant stated he was acting as a lookout for Miller who broke into the trailer looking for money, killed the man, came out with a carton of cigarettes from atop the refrigerator, and had blood on his clothing.

After a prayer in which he admitted he "sinned very badly," he admitted he had gone into the trailer and that he got blood on his clothing in an attempt to see if the old man was dead. He stated that when they left, the old man was still alive and that Miller took a carton of cigarettes from on top of the refrigerator and money from the man's wallet. He first told police that they both changed clothes at a railroad trestle where Miller had stashed a change of clothes for them, but when questioned about the anticipated need for a change of clothing, he stated that they in fact had separated and that he returned home wearing his bloody clothes. The fact that cigarettes had been taken and the fan was a probable weapon was information which the police had not released to the public.

Appellant expressed remorse and told the officers he was an accessory. However, when the officers suggested video-taping his statement, he made a complete denial and requested counsel.

Jail inmate Chris Smith testified that while he and appellant were in jail together, appellant offered to pay him money to "help" with his alibi by telling police that Smith knew who had really killed Daugherty and that appellant was only a lookout. When Smith told appellant he would not help unless appellant

told him the truth about the situation, appellant confessed that he and Miller broke into the trailer of an old man to steal money, that appellant walked into the bedroom where the old man was sleeping, punched him and slammed a box fan on the back of the man's head, getting blood on his own shirt. He told Smith he took a billfold and a carton of Viceroy cigarettes before leaving by way of a bathroom window. He then drew a diagram of the crime scene indicating the location of the fan on the bed. This description was accurate.

After both parties had rested, defense counsel received a call from another prisoner named Kenneth Riffin who said he would testify that Smith told him he was going into court and was going to commit perjury. He laughed and told Riffin not to tell anyone. Defense counsel then moved to reopen their case to place Riffin on the stand to attempt to impeach Smith. The trial judge denied that motion.

Walker v. State, 587 N.E.2d 675, 676–77 (Ind. 1992).

Our Supreme Court affirmed Walker's conviction. *Id.* at 678. In March 2003, Walker filed a petition for post-conviction relief *pro se*, which was amended in March 2006 after Walker obtained counsel. An evidentiary hearing was held on the PCR petition, and on December 6, 2006, the post-conviction court entered written findings of fact and conclusions of law denying post-conviction relief. Walker now appeals.

DISCUSSION AND DECISION

On appeal, Walker argues that the post-conviction court erred in concluding that his appellate counsel was not ineffective for failing to challenge his sentence on direct appeal. Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentence by filing a post-conviction petition. Ind. Post-Conviction Rule 1(1). Post-conviction proceedings, however, do not afford a petitioner with a super-appeal. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006) (citing *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002)). Rather, post-conviction

proceedings provide defendants the opportunity to present issues that were not known at the time of the original trial or that were not available upon direct appeal. *Id.* (citing *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164 (2002)). The petitioner for post-conviction relief has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Timberlake*, 753 N.E.2d at 597.

To prevail upon a claim of ineffective assistance of counsel, Walker must “present strong and convincing evidence to overcome the presumption that his counsel’s representation was appropriate.” *Weiland*, 848 N.E.2d at 861; *see Allen v. State*, 743 N.E.2d 1222, 1234 (Ind. Ct. App. 2001), *trans. denied*. The two-pronged standard for evaluating ineffective assistance of counsel claims was enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A defendant claiming a violation of the right to effective assistance of counsel must first show that counsel’s performance was deficient. *Weiland*, 848 N.E.2d at 681 (citing *Strickland*, 466 U.S. at 687). This requires a defendant to show that counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel as guaranteed by the Sixth Amendment. *Id.* (citing *Strickland*, 466 U.S. at 687-88). Second, a defendant must show that counsel’s deficient performance prejudiced the defense. *Id.* (citing *Strickland*, 466 U.S. at 687). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694).

The two prongs of the *Strickland* test are independent inquiries and thus, if the defendant makes an insufficient showing on one, there is no reason to address the other component of the analysis. *Id.* (citing *Strickland*, 466 U.S. at 697). This same standard is applicable whether the claim is of ineffective assistance of trial or appellate counsel. *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003).

In 1990, Walker was sentenced to sixty years for felony murder. At that time, a person convicted of murder faced a presumptive sentence of forty years “with no more than twenty (20) years added for aggravating circumstances, or not more than ten (10) years subtracted for mitigating circumstances.” IC 35-50-2-3(a) (Burns 1989). Walker claims the trial court abused its discretion in enhancing the presumptive term of imprisonment for felony murder to the maximum penalty for that offense. Walker takes the position that his sentence should not have been enhanced because the mitigating facts outweighed the aggravating circumstances. Specifically, he contends that only two of the stated six aggravators were valid, and the court made no mention of Walker’s strong work record and his “mental retardation” as mitigators. *Appellant’s Br.* at 6.

Here Walker has failed to show any prejudice resulting from appellate counsel’s decision not to raise the sentencing issue on appeal. In 1990, our Supreme Court would “not second-guess a trial court in the weighing of aggravating and mitigating circumstances unless [it could] find the trial court’s sentence to be manifestly unreasonable so that no reasonable person could find the sentence appropriate to the offender.” *Adkins v. State*, 561 N.E.2d 787, 790 (Ind. 1990) (citing former Ind. Appellate Rule 17(B)).

On the facts in this record, the manifestly unreasonable standard could not have been met. During the sentencing hearing, the trial court learned that Walker had attended school until the ninth grade, at which time he quit because of drugs and because he was teased for being in special education. *Tr.* at 642. Thereafter, Walker had steady employment working at various laundry companies and starting his own lawn care business. *Id.* at 642-43. The trial court further learned that Walker's family was very supportive of him and that, while Walker had various misdemeanor convictions, this was his first felony conviction.

Without prompting from the defense, the State initiated consideration of Walker's mental state as follows:

I think I will address a couple of mitigators first since [defense counsel] spoke to those. I believe it is true that [Walker] has no priors at least felonies. It's obvious from the letters that he does have a family support system and I think that's good. We don't always see that. I guess that I will have to say this, I don't think it's a statutory mitigator, but I feel compelled in this case for some reason. I don't think a mental capacity of a defendant is a mitigator, however, I question whether Mr. Walker is a kind of person, I guess I'm not completely convinced that would act by himself in such a crime as this. Although, today during trial and during his presentence he denies all involvement in the crime which I have a tendency not to believe. I still question whether he is the type who acted totally upon his own.

Id. at 649-50.

Regarding aggravators, the defense admitted that the victim was sixty-five years of age or older and that he was "mentally or physically infirm." *Tr.* at 646. The State noted that the burglary was a schemed and calculated plan and that the victim, who was eighty-two years old, was in his own home—a place where "citizens of Indiana have a right to be." *Id.* at 650. The State noted that even more troubling was the fact that the attack took place in the

victim's bedroom while he was asleep. The victim, who sometimes used a walker, posed no threat as Walker could have run away. *Id.* at 651.

Balancing the mitigating and aggravating factors, the trial court concluded that the victim was an unarmed, eighty-two-year-old man, who was savagely attacked in his own home so that Walker could steal a carton of cigarettes and a few dollars. *Id.* at 654. The trial court considered and dismissed a list of statutory mitigators and concluded that only two applied—that this was Walker's first felony conviction and that he had support from his family. Finally, the trial court set forth the aggravators, including the age of the victim, the victim's infirmity, the amount of planning required to execute the burglary, the heinousness of the crime, and that Walker had not voluntarily sought rehabilitative treatment.¹

The trial court heard the aggravating and mitigating factors pertaining to Walker, including the State's contention that based on his mental state Walker may not have acted alone. Even in light of this statement, the trial court balanced the aggravators and mitigators and sentenced Walker to the maximum sentence. We cannot say that no reasonable person could have reached the same decision that the trial court reached in regard to sentencing. *See Adkins*, 561 N.E.2d at 790. Because Walker has been unable to prove prejudice by appellate counsel's failure to appeal his sentence, we need not address the effectiveness of his counsel. We affirm the post-conviction court's denial of Walker's post-conviction relief.

Affirmed.

¹ Under the health and behavior section of the pre-sentence investigation, the probation officer reported: "The defendant does smoke cigarettes and states that he has been addicted to alcohol for approximately 5 years but has never received any treatment. The defendant further states that he has smoked marijuana for the last 8 years and that he feels he does need help for this problem. The defendant

ROBB, J., and BARNES, J., concur.

states that he is in good health, and that there is no history of mental problems in his family.” *Appellant’s App.* at 91.